

Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy

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I. INTRODUCTION

In today's complex world the search for structured and logical answers has led to a controversy over the ability of economic theory to assist in the resolution of many pressing social problems.¹ Both law and economics scholars have engaged in this controversy. Among those individuals who support the application of economic analysis to legal principles and social policy are a group of scholars best identified as "classical liberals."² These classical liberals are a diverse collection of scholars typified by a strong belief in individual liberty. One of the significant founding fathers of classical liberalism is Adam Smith,³ whose general views on individual liberty have been refined and expanded upon by three factions: the followers of the "Austrian School of Economics,"⁴ particularly Ludwig Von Mises and Friedrich Hayek; the "Chicago School of Economics," best represented by Milton Friedman;⁵ and to a lesser extent by legal scholars best represented by Judge Richard Posner.⁶

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1. See generally Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 UCLA L. REV. 1260, 1260–69 (1982); Kuttner, *The Poverty of Economics*, ATL. MONTHLY, Feb. 1985, at 74. "Lately, almost all public policy questions have been defined as economic ones." *Id.* at 79.

2. "Classical liberal" is used to refer to the term "liberal" not as it may be understood in the political arena of the 1980s but as it was understood in the context of the eighteenth and nineteenth centuries. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 4–6 (1962 reissued 1982); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 54–70 (1960).

3. Adam Smith is best known for his treatise on political economy, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, published in 1776, but he was also known as a moral philosopher as revealed in his book, *THE THEORY OF MORAL SENTIMENTS*, published in 1759. Probably least known about Smith is that he was also a legal philosopher and gave lectures on jurisprudence at the University of Glasgow. See A. SMITH, *LECTURES ON JURISPRUDENCE* (R. Meek, D. Raphael & P. Stein ed. 1978).

4. The "Austrian School of Economics" is responsible for a number of philosophers of economic, political, and social theory in addition to Von Mises and Hayek. See A. SHAND, *THE CAPITALIST ALTERNATIVE: AN INTRODUCTION TO NEO-AUSTRIAN ECONOMICS* (1984). This book provides a basic introduction to the Austrian approach to economic theory and its relationship to other schools of economic and social philosophy.

5. The "Chicago School of Economics" is best known for its free market philosophical approach to economics and social policy. In addition to Milton Friedman, Thomas Sowell has generated a significant degree of notoriety for his free market evaluation of civil rights and his thesis that governmental programs of the last several decades have been more detrimental than beneficial to blacks and other minorities. See, e.g., T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* (1984).

6. Judge Richard Posner is a prominent advocate of Law and Economics both because of his position on the Seventh Circuit Court of Appeals and because of his prolific writing on the subject including his widely used book, *ECONOMIC ANALYSIS OF LAW* (1972). As Richard Epstein has said with reference to Posner's significant influence on Law and Economics, "Whether he is right or wrong on particular issues is a distinctly secondary consideration." See Epstein, *Professor Now Judge—A Tribute to Richard A. Posner*, 12 J. LEGAL STUD. 1 (1983). Posner sees the development of an economic analysis of law as emerging from two branches of scholarship in the eighteenth century. See Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 281–84 (1979). One branch originated with Adam Smith and focuses on the laws regulating the "economic system." *Id.* at 281. The other branch of scholarship emerges from the work of Jeremy Bentham and focuses on an economic analysis of nonmarket behavior such as accidents, crime, marriage, pollution, and the legal and political processes themselves. *Id.* at 282. For criticism of Posner and his economic analysis of law, see Baker, *The Ideology of the Economic Analysis of Law*, 5 J. PHIL. PUB. AFF. 3, 3–48 (1975) (identifies biases in the Posner approach); Kronman, *Wealth Maximization As Normative Principal*, 9 J. LEGAL STUD. 227, 227–42 (1980).

These classical liberals also may be identified as social and political thinkers who share a common belief that the free market approach to law and social policy best ensures the greatest possible sphere of personal liberty for the individual.

Classical liberals are neither liberals nor conservatives as those terms are generally understood in the United States.⁷ The term "classical liberal" derives from the British liberal tradition of Adam Smith and David Hume. In this context, a liberal was one who advocated freedom of the individual and reduction of governmental power and control. In the United States, defenders of these principles were liberals in the British sense. Over the course of American history, however, the promoters of an active role for government at the expense of individual autonomy acquired the label "liberal" and left the defenders of classical British liberalism to oppose increasing governmental involvement under the guise of "conservatism."⁸ This role reversal has been most pronounced since the 1930s when the term liberalism came to be associated with a readiness to rely on state intervention and paternalism, rather than on private voluntary arrangements, to achieve certain social objectives.⁹

To the extent that classical liberals are not properly understood to be liberals in the current American sense, they are, likewise, not conservatives. Both Milton Friedman and Friedrich Hayek, for instance, make affirmative efforts to distinguish themselves from conservatives.¹⁰ Hayek views conservatives and liberals as being defined not by the question of how powers of government should be limited to protect personal liberty, but rather, by each group's concern with who should wield such powers.¹¹ Furthermore, he sees in each group an elitist feeling of entitlement to impose its values onto society as a whole.¹² In an effort to recapture the meaning of "liberalism" as that term originally stressed individual freedom from unnecessary coercion by the state, the term "classical liberal" is used in this Article to refer to

(attacks Posner's normative principle of wealth maximization); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451-82 (1974); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 307-15 (1979) (wealth maximization is a principle biased in favor of the wealthy).

Judge Posner shares many of the philosophies underlying classical liberalism but departs from them in one significant way. While contributing much to the development of a combined theory of law and economics, Posner has become too confined by amoral principles of wealth maximization and utilitarian cost and benefit analysis. He thus departs from the moral underpinnings of Adam Smith's theory and cannot therefore be said to contribute as much as Friedman and Hayek to current classical liberalism.

7. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 397-417 (1960).

8. See *id.* at 397-98.

9. M. FRIEDMAN, *CAPITALISM AND FREEDOM* 5-6 (1962 reissued 1982).

10. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 4-6 (1962 reissued 1982); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 397-417 (1960). In his postscript chapter titled "Why I Am Not a Conservative," Hayek provides the following commentary:

This fear of trusting uncontrolled social forces is closely related to two other characteristics of conservatism: its fondness for authority and its lack of understanding of economic forces. Since it distrusts both abstract theories and general principles, it neither understands those spontaneous forces on which a policy of freedom relies nor possesses a basis for formulating principles of policy. Order appears to the conservatives as the result of the continuous attention of authority, which, for this purpose, must be allowed to do what is required by the particular circumstances and not be tied to rigid rule. A commitment to principles presupposes an understanding of the general forces by which the efforts of society are co-ordinated, but it is such a theory of society and especially of the economic mechanism that conservatism conspicuously lacks.

F. HAYEK, *THE CONSTITUTION OF LIBERTY* 400-01 (1960).

11. F. HAYEK, *THE CONSTITUTION OF LIBERTY* 401-03 (1960).

12. *Id.*

liberalism in the British tradition as distinguished from the current ideology of both conservatives and liberals.

In this philosophical context, classical liberalism has promoted the usefulness of economic analysis when it is applied to social and political philosophy. Unfortunately, in the controversy over the application of economic theory to law and social policy, economists and political thinkers have hindered the efforts of classical liberals by applying cost and benefit analysis in a supposedly "neutral" and "objective" manner devoid of moral judgment.¹³ This alleged neutrality and objectivity leaves philosophers without a theory of social justice or of "right" and "wrong" in a free society.¹⁴ This neutralizing approach leads to the following conclusion:

It is a mistake to try to contrast human rights and property rights. Property rights are human rights to the use of economic goods. To see a conflict between human rights to use property and civil rights is equally misguided. Civil rights do not conflict with human rights to use goods.¹⁵

It is this amoral approach to equating "human" with "property" rights that detracts from a broader societal acceptance of the usefulness of economic theory in the discussion of law and social policy.

When human rights and property rights are assigned equivalent values, the danger emerges that the logical conclusions of economic analysis may result in policy directives so contrary to the normative values of the society that both the economic and legal systems are discredited by society. To the extent that a certain school of economic theory, such as free market economics, becomes associated with human rights policy directives that continually affront the normative values of the general populace, that economic theory loses its credibility in other areas where it might otherwise make a valid, socially acceptable contribution to law and social policy. Indeed, if a free market economy holds the keys to the greatest enjoyment of personal liberty, then proponents of its preservation cannot afford to lock out the use of moral judgment in upholding the natural dignity of the individual.

13. The claim that the economic approach is both neutral and objective cannot be taken literally. Though economists try to remove moral issues from their models, the typical economic model will start from the proposition of the status quo, which necessarily accepts current distribution of income and property, and will then seek to make some predictive evaluation of response to changed variables. Thus, the economist's model assumes the free market approach to private property and ownership as a desirable given. Whether or not one agrees with this approach or the underlying assumptions, it is nonetheless inaccurate to label it either neutral or objective. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 1-23 (1977) (basic introduction to the economic approach and its use in legal analysis). See also Kuttner, *The Poverty of Economics*, ATL. MONTHLY, Feb. 1985, at 74.

The study of who gets what and why, unlike the study of plants or planets, cannot help being an ideologically charged undertaking. Despite the laborious techniques and scientific pretensions, most brands of economics are covertly ideological. Marxian economics, with its labor theory of value, assumes the inevitability of class conflict, and hence the necessity of class struggle. Keynesianism, with its conviction that industrial capitalism is systemically unstable, offers an equally "scientific" rationale for government intervention. Neoclassical economics, with its reliance on the efficiency of markets, is a lavishly embroidered brief for laissez-faire.

Kuttner at 83.

14. See Rothbard, *Justice and Property Rights*, in *PROPERTY IN A HUMANE ECONOMY* 101-22 (S. Blumenfeld ed. 1974).

15. A. ALCHIAN & W. ALLEN, *EXCHANGE & PRODUCTION* 114 (2d ed. 1977). See also R. MCKENZIE & G. TULLOCK, *THE NEW WORLD OF ECONOMICS* 6 (1975); M. ROTHBARD, *THE ETHICS OF LIBERTY* 113 (1983) (human rights and property rights are the same).

In order to provide a better understanding of the need for moral judgment by proponents of an economic analysis of law and social policy, this Article will explore three issues: first, the role of normative values in law and economics, second, the relationship between human rights and property rights, and finally, the limitations of economic analysis in evaluating law and social policy.

II. NORMATIVE VALUES IN LAW AND ECONOMICS

Both economists and lawyers believe in behavioral models. Economists use behavioral models to predict responses to changes in the perceived costs and benefits of engaging in certain activities.¹⁶ Similarly, lawyers believe that law helps shape human conduct by proscribing or permitting certain activities, and that laws are perceived to be normatively good and effectively enforced.¹⁷ In both an economic and a legal system, social acceptance of either system requires a normative belief that, in its operation and observable consequences upon individuals, the system itself is fair, reasonable, and just.

Because in a free society affirmative enforcement of all laws at all times is impractical if not impossible, and because resources for law enforcement are limited, a legal system in a free society must depend in substantial part on voluntary compliance.¹⁸ Thus, so that the law will be obeyed in substantial part, a significant segment of the general populace must view the enforcing state and its operative legal system as legitimate.¹⁹ To accomplish this normative acceptance of its laws, the state,

16. See Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 353-57 (1984); R. MCKENZIE & G. TULLOCK, *THE NEW WORLD OF ECONOMICS* 3-21 (1975). "The economist begins his analysis of human behavior with the assertion that *man acts* and he does so with a purpose." R. MCKENZIE & G. TULLOCK, at 8 (emphasis in original).

17. See Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 353-57 (1984). See also Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1015-48 (1978) (law is more than one-dimensional—it has moral, social, and political as well as economic aspects).

18. See Hoeflich, *Of Reason, Gamesmanship, and Taxes: A Jurisprudential and Games Theoretical Approach to the Problem of Voluntary Compliance*, 2 AM. J. TAX. POL'Y 9, 15-23 (1983) (a creative and innovative view of problems of tax compliance in relation to theories of gamesmanship and jurisprudence). See also H. HART, *THE CONCEPT OF LAW* 83-114, 133-37 (1961).

For it cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. Laws function in their lives not merely as habits or the basis for predicting the decisions of courts or the actions of other officials, but as accepted legal standards of behaviour. That is, they not only do with tolerable regularity what the law requires of them, but they look upon it as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others.

Id. at 134.

19. See Hoeflich, *Of Reason, Gamesmanship, and Taxes: A Jurisprudential and Games Theoretical Approach to the Problem of Voluntary Compliance*, 2 AM. J. TAX. POL'Y, 9, 17-20 (1983). See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-13 (1977); L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969):

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted. . . . [T]here is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.

L. FULLER, *THE MORALITY OF LAW* 39-40 (rev. ed. 1969).

in allocating scarce resources to lawmaking and law enforcement, should give priority to activities deemed most worthy of state intervention. For example, preventing murder legitimately merits substantially more social resources than preventing jaywalking.²⁰

Economic systems, like legal systems, must also be legitimized by societal acceptance. Otherwise, the method of distributing income and property could be altered by force of law or revolution.²¹ For an economic system to win and retain social acceptance, it must be perceived by a significant number of individuals within the society as fair, reasonable, and just in its operation and in its observable consequences, regardless of whether that society is currently capitalistic, socialistic, or communistic.

To be fair, reasonable, and just requires that an economic system, like a legal system, demonstrate a degree of moral judgment that transcends the confines of purely utilitarian calculations of cost and benefit analysis in determining social policy. Even Adam Smith recognized the problems of morality and justice in a free society. Smith's book, *The Wealth of Nations*,²² cannot be read in isolation from his earlier work entitled *The Theory of Moral Sentiments*.²³ Together, these works give us not only a theory of human behavior in the marketplace, but they reveal Smith's underlying belief that self-interest and happiness within society depend upon high standards of moral conduct.²⁴ Such a view recognizes the practical problem, in a complex society, of reconciling not only different individual economic interests but also different individual political and moral values held by people of varying dispositions, philosophies, and creeds. These individual differences cannot always be reconciled by appeal to a given theory or model of behavior, but oftentimes the societal standard must turn on collective notions of what is "right" and "wrong."

It would be at this juncture, on the issue of right and wrong in a model of behavior, that economists tend to go separate ways. On one hand, Smith and Hayek

20. This second criterion seems to follow from a need to have law and the aspirations of law correspond to accepted general notions or norms concerning the seriousness of certain breaches of moral and social conduct.

21. See J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 190-91 (1950) (morality and one's sense of justice are an important factor in the evaluation of the merits of a particular social or economic structure).

22. See A. SMITH, *THE WEALTH OF NATIONS* (E. Cannan ed. 1976).

23. A. SMITH, *THE THEORY OF MORAL SENTIMENTS* (E. West ed. 1976).

24. *Id.* Referring to the application of general rules of moral conduct, Smith observes:

When these general rules . . . are universally acknowledged and established by the concurring sentiments of mankind, we frequently appeal to them as to the standards of judgment, in debating concerning the degree of praise or blame that is due to certain actions of a complicated and dubious nature. They are upon these occasions commonly cited as the ultimate foundations of what is just and unjust in human conduct. . . .

. . . .

Without this sacred regard to general rules, there is no man whose conduct can be much depended upon. It is this which constitutes the most essential difference between a man of principle and honour and a worthless fellow.

. . . The happiness of mankind, as well as of all rational creatures, seems to have been the original purpose intended by the Author of Nature when he brought them into existence. No other end seems worthy of that supreme wisdom and divine benignity which we necessarily ascribe to him; and this opinion, which we are led to by the abstract consideration of his infinite perfections, is still more confirmed by the examination of the works of Nature, which seem all intended to promote happiness, and to guard against misery.

Id. at 265-75.

support the moral underpinnings of social and economic relationships, and on the other hand, McKenzie and Tullock preach that "[t]he approach of the economist is *amoral*."²⁵ The classical liberal, while finding valuable insight in the theory of economics, also knows that resolving many of our most pressing social problems requires reference to moral principles.

Moral principles can be found in notions of natural law and involve concepts of right and wrong sanctioned by theological, logical, and biological theories of morality.²⁶ Morality, as it is commonly understood, has been found to exist among all peoples in one form or another.²⁷ Additionally, the fundamental beliefs of various peoples seem to concur in regarding murder, theft, trespass, adultery, and false witness as antisocial and immoral behavior.²⁸ Despite general agreement on certain basic moral norms, however, the authority for one's moral beliefs differs considerably over time and place.²⁹ Thus, applying moral judgment to economic analysis does not require adherence to the moral authority of any one person, group, or organization within a community or society.³⁰ Rather, the exercise of moral judgment requires an understanding of the relationship between human rights and property rights within the context of an underlying respect for human life and dignity, whether or not one bases this respect on religious, intellectual, or biological theories.³¹

III. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND PROPERTY RIGHTS

Equating human rights and property rights creates normative difficulties for the proponents of an economic analysis of law and social policy. To understand these difficulties, one must examine the contours of individual liberty and the relationship of human rights to property rights.

25. R. MCKENZIE & G. TULLOCK, *THE NEW WORLD OF ECONOMICS* 6 (1975) (emphasis in original). "Economics is not concerned with what *should be* or how individuals behave, but rather with understanding why people behave the way they do." *Id.* (emphasis in original).

26. See H.L. MENCKEN, *TREATISE ON RIGHT AND WRONG* 14 (1977). Theological systems of morality are based in religious doctrine. Logical systems of morality stem from philosophical inquiries and seek to justify human conduct on purely logical grounds, rather than on the will of the gods. Biological theories of morality originate in Darwin's work on "The Descent of Man," wherein the moral passions of man are linked to instinct and are alleged to be observable in many lower animals. See *id.* at 1-62. See also A. SMITH, *LECTURES ON JURISPRUDENCE* 13 (R. Meek, D. Raphael & P. Stein ed. 1978) (application of natural law principles); *AN AQUINAS READER* 355-87 (M. Clark ed. 1972) (Aquinas discusses the moral aspects of man and of law.). See generally, L. FULLER, *THE MORALITY OF LAW* (1964); F. HAYEK, *LAW, LEGISLATION AND LIBERTY* (This three-volume work explores in detail many of the philosophical and moral issues first discussed in F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960)).

27. H.L. MENCKEN, *TREATISE ON RIGHT AND WRONG* 5 (1977).

28. See *id.* at 6-8.

29. *Id.* at 8-62.

30. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 67-70 (1960). Morality is an important part of freedom, but that liberty is destroyed when the moral beliefs of a few are forced upon the whole. Moral rules, like legislation, need to be limited by general rules.

None of these conclusions are arguments against the use of reason, but only arguments against such uses as require any exclusive and coercive powers of government; not arguments against experimentation, but arguments against all exclusive, monopolistic power to experiment in a particular field—power which brooks no alternative and which lays a claim to the possession of superior wisdom and against the consequent preclusion of solutions better than the ones to which those in power have committed themselves.

Id. at 70.

31. *Id.* at 66-78.

Individual liberty represents the freedom from outside coercion in the daily pursuits of living.³² It is not a right to do anything one desires, for the exercise of individual liberty embodies within it a respect for the liberty of others.³³ Thus, one should be free to travel, work, and enjoy the benefits of one's own labor, but should not be entitled to interfere with the right of another to do likewise. The fundamental concept of individual liberty is a view of social relationships that provides for a sphere of personal autonomy over one's own thoughts and actions free from the outside coercive interference of others.³⁴ Coercive interference results when the environment or circumstances of an individual are controlled by another to the extent that, in order to avoid greater evil, one is forced to act not according to one's own designs but to serve the ends of another.³⁵ This coercion is "evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another."³⁶

On the other hand, this sphere of personal autonomy is not limitless. The concept of individual freedom in a market economy or laissez-faire type social organization requires governmental restriction of antisocial behavior that, if left unchecked, would disintegrate social cooperation and civilization.³⁷ Thus, within the confines of a free society, the state can be a legitimate collective vehicle for protecting the individual's liberty from the coercive interference of others,³⁸ even though the accomplishment of that goal may result in some limitation on the rights of individuals to engage in uncontrolled antisocial behavior, such as robbery or murder. In this respect, the state is granted a monopoly over the exercise of coercive powers against the individual. A system of general rules and principles is necessary to guide and restrict the coercive power of the state so that the greatest sphere of personal liberty can be preserved for the individual.³⁹ Thus, the societal structure, in order to restrain the coercive power of the state, requires a system of checks and balances that

32. See *id.* at 11-21. "The state in which a man is not subject to coercion by the arbitrary will of another or others is often also distinguished as 'individual' or 'personal' freedom." *Id.* at 11. See also M. FRIEDMAN, *CAPITALISM AND FREEDOM* 14-21 (1962 reissued 1982).

33. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 11-21 (1960). See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 240-78 (1978). Moral considerations play a role in determining the scope of liberty. Although Dworkin does not argue for a specific right to liberty, he reaches a similar conclusion on grounds of political morality that make it wrong to deprive individuals of certain liberties. See also M. FRIEDMAN, *CAPITALISM AND FREEDOM* 14-21 (1962 reissued 1982).

34. F. HAYEK, *THE CONSTITUTION OF LIBERTY* 13 (1960). See also M. ROTHBARD, *THE ETHICS OF LIBERTY* 35-43 (1983) (discusses the natural right to seek interpersonal relations and voluntary exchanges).

35. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 21 (1960).

36. *Id.*

37. See L. VON MISES, *HUMAN ACTION* 279-87 (1963).

38. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 11-21 (1960). See also F. HAYEK, *THE ROAD TO SERFDOM* 82-83 (1944). The idea of government as a protector of individual freedom does not, however, mean that whatever the government does in the name of this power is to be considered proper. Hitler may have gained power and acted in a strictly constitutional manner but this would not make his rule "right." See also A. NOZICK, *OUR ENEMY THE STATE* 23-35 (1983). Nozick distinguishes the notion of "government," a beneficial grouping within a free society, from that of the "state," which he sees as a powerful entity in competition with a valid government. Throughout this Article, the term "state" merely indicates a geographical entity governed by a recognized governmental entity.

39. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 21 (1960); see also R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1968) (defends individual liberty and seeks to define the proper role of the state in a society that values the individual as the basis of freedom); L. VON MISES, *HUMAN ACTION* 280 (1963) (argues that by putting coercive power in the hands of government and then restricting government by the rule of law, liberty is best preserved within society).

distributes political power in multiple centers.⁴⁰ In such a system, competition and jealousy among the leaders of various centers of governmental power operate to reduce the probability that the full power of the organized state will be used against an individual or group. Likewise, a system of free enterprise that allows diverse individuals within the society to accumulate wealth permits those persons to use their wealth in profitable endeavors to challenge and restrain the state when it is in their self-interest to do so.⁴¹ In this way, the state serves as a check on private interference with individual liberty, while private sources of wealth place resources that can serve as a countercheck against the state beyond the reach of the state.

Within these contours of an understanding of individual liberty, notions of human rights and property rights take form. In general, property rights can be viewed as economic rights—the ability of the individual to exercise control over material possessions, means of producing wealth, and the ability to enter into voluntary transactions of exchange. Freedom with regard to property or economic rights does not mean the total absence of governmental interference, for economic freedom, even in the thinking of Adam Smith, does not exclude general regulations of economic activity in the form of rules applicable to all persons engaging in a certain enterprise.⁴²

Property rights are properly viewed as an important element of human rights, for human rights include the economic freedom to exercise control over one's property.⁴³ However, human rights are not equivalent to property rights, because human rights include notions of what Thomas Aquinas calls the essence of man—his humanity.⁴⁴ This notion of human rights is reflected in the normative values of American society through the following often-quoted words of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."⁴⁵ It is the natural right of human life and

40. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 14–21 (1962 reissued 1982).

The fundamental threat to freedom is power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority. The preservation of freedom requires the elimination of such concentration of power to the fullest possible extent and the dispersal and distribution of whatever power cannot be eliminated—a system of checks and balances.

Id. at 15. See also A. Nock, *OUR ENEMY, THE STATE* 23–35 (1983) (Concentrating power in the state and progressively removing decision-making from the individual and from local government leads to the destruction of liberty.).

41. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 7–21 (1962 reissued 1982).

42. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 220–27 (1960).

43. See M. ROTHBARD, *THE ETHICS OF LIBERTY* 113–19 (1983) (declares human rights to be the same as property rights).

44. See AN AQUINAS READER 39–104 (M. Clark ed. 1972); E. BOHM VON BAWERK, *SHORTER CLASSICS OF BOHM VON BAWERK* 32–138 (1962) (He criticizes Adam Smith for not including items beyond material goods in the discussion of economic matters and seeks to identify a proper expansion of the scope of economic goods, considering legal rights and individual relationships. Relevant to the issue of why human rights and property rights are not equivalent, he states, "For under the social conditions that prevail in our society where slavery no longer exists, persons themselves can never again be regarded as economic objects." F. BOHM VON BAWERK at 51.)

45. The Declaration of Independence para. 1 (U.S. 1776). See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) (For a discussion of moral and social attributes of law and liberty, see 46–80, 240–90.); F. HAYEK, *THE ROAD TO SERFDOM* 84 (1944) (discusses the inalienable rights concept); Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal*

human dignity that derives from existing through participation with one's creator that separates human rights from property rights.⁴⁶

Thus, notions of human rights and property rights are inextricably related to the concept of individual liberty. In the context of pressing social problems, economic analysis will be useful only to the extent that it provides a framework for dealing with both human rights and property rights.

IV. LIMITATIONS OF ECONOMIC ANALYSIS

Today, American society is confronted with many complex social problems.⁴⁷ Evaluating and resolving these problems require that policymakers appeal to many interdisciplinary theories to achieve a better understanding of the problems and to move closer to a reasonable corrective response. From this perspective, economic analysis can be a useful tool in the evaluation of law and social policy. But economics, like other disciplines, has its limitations. In a complex society, rights are not always absolute; once there is a retreat from the absolute, lines have to be drawn by an imperfect process of balancing competing interests.⁴⁸ Some of these interests are economic interests, but, unfortunately for the usefulness of economic analysis, other interests such as political and moral interests must also be considered.

Looking first at the usefulness of economic analysis, it is helpful to consider Milton Friedman's analysis of private and public education in the context of the social objective of the state-supported or subsidized university.⁴⁹ State-supported universities have been justified as an important mechanism for providing quality educational opportunities to the lowest level income groups on the economic ladder.⁵⁰ Tales abound of the poor, small-town farm boy or the girl from the urban ghetto who became respected and successful professionals by attending state-supported institu-

History, 9 J. LEGAL STUD. 335, 335-53 (1980) (Law is a moral science and by its very nature must address moral issues.). See also AN AQUINAS READER 39-104 (M. Clark ed. 1972) (discusses humanity's existence through participation with God).

46. See AN AQUINAS READER 39-104 (M. Clark ed. 1972). See also NATIONAL CONFERENCE OF CATHOLIC BISHOPS, FIRST DRAFT PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (Nov. 11, 1984).

The dignity of the human person is the criterion against which all aspects of economic life must be measured. This dignity can only be realized in relationship and solidarity with others.

...

Economic institutions are to be evaluated not only by productive efficiency and the amount of goods and services they make available; we must also ask: Do these institutions permit all persons that measure of active social and economic participation which befits their membership in the human community?

...

... [A]ll persons have rights in the economic sphere and that society has a moral obligation to take the necessary steps to ensure that no one among us is hungry, homeless, unemployed, or otherwise denied what is necessary to live with dignity.

...

Human personhood must be respected with a reverence that is religious. When we deal with each other we should do so with the sense of awe that arises in the presence of something holy and sacred.

NATIONAL CONFERENCE at 1-4.

47. To name a few: public education, rent control, abortion, the right to die, surrogate parenting, toxic waste control, and acid rain.

48. See generally M. ROTHBARD, THE ETHICS OF LIBERTY 113-19 (1983) (seeks to equate human rights and property rights in order to protect absoluteness).

49. See M. FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962 reissued 1982); M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 175-88 (1980); M. FRIEDMAN & R. FRIEDMAN, TYRANNY OF THE STATUS QUO 158-64 (1984).

50. See M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 181-83 (1980).

tions. But the reality of state-supported universities is that they are populated primarily with students from middle and upper middle class American families.⁵¹ Very few children of lower income families actually benefit from the advanced educational system that their tax dollars must help support.⁵² As a result, state universities have become cherished subsidies for people who could afford to pay more than the rate charged by the state. At the same time, the system of subsidized higher education makes it harder for unsubsidized private institutions to compete for well-qualified students. And finally, from a student's perspective, it means that the state institution, which often charges much less tuition than the private institution, can provide as little service as possible since the student's alternatives are all considerably more expensive.⁵³

Economic analysis in this situation indicates that a direct subsidy would better effectuate the social policy of providing higher education for people from modest or low income groups. To illustrate, if the social objective is to help 100 poor individuals get a college education, it is not necessary to subsidize 20,000 middle class persons at the same time. By subsidizing the individual rather than the institution, every student would have a realistic opportunity to attend any college or university for which he or she qualified; likewise, each college or university would have to earn that student's application on the basis of the school's reputation, not merely by its tuition.

Another example of the usefulness of economic analysis is its application to rent control and housing policy issues.⁵⁴ Rent control is envisioned as a means of assuring that housing is made available to people of limited incomes, but an analysis of the effects of legislated rent controls, however, reveals a different result.⁵⁵ The rental housing market is a relatively competitive market with most landlords owning only a few rental units.⁵⁶ For the owners of rental housing, ownership represents just one possible investment available from numerous alternatives such as stocks, bonds, money market funds, computers, and material pleasures.⁵⁷ The level of investment in rental housing and, thus, the supply of rental housing stock, will be affected by the owner's expected rate of return on the investment.⁵⁸ Rent control reduces not only the owner's rate of return, but it also limits the owner's ability to make quick cash flow adjustments in response to changes in the market price of input items, such as fuel, repairs, and maintenance.⁵⁹ Rent restrictions consequently provide an incentive to invest money in alternative activities and to convert rental housing units to

51. *Id.*

52. *Id.*

53. The average cost of tuition and fees for four-year colleges in 1985-86 is \$1,242 for public institutions and \$5,418 for private institutions. *Back to School*, Wall. St. J., Sept. 6, 1985, at 21, col. 2.

54. See Hoefflich & Malloy, *The Shattered Dream of American Housing Policy—The Need for Reform*, 26 B.C.L. REV. 655 (1985).

55. *Id.* at 669. The benefactors of rent control are current tenants, while future tenants are hurt by the lack of incentive to build new housing, either for them directly or for other groups that would move to new housing and thereby open up existing facilities to new residents. *Id.*

56. *Id.* at 664 (citing THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING (1982)).

57. *Id.* at 655.

58. *Id.*

59. *Id.* at 667.

condominiums and cooperatives for sale to higher income buyers.⁶⁰ Additional legislation restricts conversion and disinvestment in rental housing and at the same time necessitates guidelines of habitability that force reluctant landlords to perform repairs and upkeep work.⁶¹ As a consequence of the combination of laws designed to provide an adequate housing stock for the poor, the disincentives for investment result in a shortfall of appropriate rental housing.⁶² So again, economic analysis indicates that the most effective way to assist low income tenants or prospective tenants is by a means other than generalized rent controls.⁶³

Even in the two examples just cited, however, the incompleteness of economic theory is evident. The underlying question of whether or not an individual should be entitled to an education or to shelter cannot be answered by economic analysis alone. The difficult questions of what rights or what treatment befits human beings in our society are questions that must be answered by means other than economics.⁶⁴ Economics becomes a valuable analytical tool only after reason resolves the nature of the right to be explored. That is, given the decision that an individual should have access to education or to shelter, then economic analysis can assist in evaluating the most effective and efficient allocation of resources to achieve that socially desired objective.

This problem is further illustrated by the following hypothetical which was posed to a professor of economics:⁶⁵ Jones is a 70-year-old man with no surviving family, no insurance of any sort, no retirement benefits, and is seriously ill with no hopes of recovering to return as a productive worker in the community. Jones nonetheless checks into the local hospital with only one request. He wants to live. In order for Jones to live he will need to stay at the hospital and use space, medicine, equipment, and professional care—none of which he can afford. If property rights

60. *Id.* at 669.

61. *Id.* at 667.

62. *Id.* at 669.

63. *Id.* at 683.

64. Lon Fuller considers the problems of morality in the context of what should be the relevant community reference when one considers the rights or treatment befitting a human being in society. See L. FULLER, *THE MORALITY OF LAW* 181–84 (Rev. ed. 1969). In seeking to address this issue, Fuller refers to both the New Testament and to the Talmud. From the New Testament Fuller refers to the parable of the Good Samaritan.

A certain man had been struck down by thieves and left half dead. Two of his community brothers passed him by without offering aid. Then one of the despised Samaritans—definitely a member of the out-group—bound up his wounds and took him into care. Jesus ends with the question: “Which now of these three, thinkest thou, was neighbor unto him that fell among the thieves?”

The meaning of this parable is, I believe, not that we should include everyone in the moral community, but that we should aspire to enlarge that community at every opportunity and to include within it ultimately, if we can, all men of good will.

In the Talmud there is a passage that reads, “If I am not for myself, who shall be for me? If I am for myself alone, what am I?” If we put this in the plural, we have, “If we are not for ourselves, who shall be for us? If we are for ourselves alone, what are we?” Whatever answer we may give to this last question, it must be predicated on the assumption that we are above all else human beings. If we have to qualify our answer by adding some biological tag line to our own title, then we deny the human quality to ourselves in an effort to justify denying it to others.

Id. at 182–84 (quoting from *Luke* 10:25–37; *Aboth*, ch. 1, *Mishnah* 14).

65. The professor will remain unnamed but the incident actually occurred during one of the author’s seminars on Law and Economics.

and human rights are equivalent and we can therefore analyze all such rights through the use of economic analysis, how would the model deal with the situation of Jones?

The professor responded with two answers. First, economics must look to the law to define property rights and only then can the economic model be invoked to provide a critical evaluation of the definition imposed by the law. When it was suggested that this response left all of the difficult problems of law and social policy to lawyers without any apparent opportunity for economics to aid in the difficult first task of definition, the professor suggested rather uncomfortably his second avenue of analysis, which, it should be noted, was perfectly consistent with his earlier economic analysis of zoning laws and contract rights.⁶⁶ His analysis in the second instance centered on the social cost of the medical treatment and services needed to sustain an elderly unproductive person. To transfer wealth for the support of this indigent "free loader" would infringe upon the property rights of those in society required to pay for his treatment and would send an improper message to others who would see that one could receive free care and treatment in old age regardless of earlier planning and sacrifice, such as buying insurance or saving money.⁶⁷ The conclusion that followed was that, to protect the property rights of others and to achieve efficient use of scarce social resources, Jones should not be entitled to treatment.

To the classical liberal, there is certainly some merit in the cost and benefit factors discussed by the professor of economics, but the moral imperative respecting the value of human life would first require one to address the question whether a person should be entitled to some minimal level of respect or, as in this hypothetical, to some minimal level of medical care. The professor was correct in stating that economics must look to factors beyond the cost and benefit model to evaluate this type of social problem. But he would not need to look beyond his economic model if he would realize that economic models have, or at least should have, moral components.

When a professor of economics can assert that a "neutral and objective" economic model would dictate the death of the hypothetical Mr. Jones, then such a conclusion should affront the sensibilities of all people. This is so because it deprives an equally deserving individual, Mr. Jones, of his most fundamental personal liberty—his expectation that in a free society an individual should not be deprived of life merely because he or she is indigent. Perhaps more importantly, for this economist and others of similar view, is that his conclusion would be rejected by the very "free market" economists they purport to follow. This economist and many others purport to follow the free market philosophy of Smith, Friedman, and Hayek,

66. See, e.g., R. MCKENZIE & G. TULLOCK, *THE NEW WORLD OF ECONOMICS* (1975); L. PHILLIPS & H. VOTEY, *ECONOMIC ANALYSIS OF PRESSING SOCIAL PROBLEMS* (1974) (Both books set forth an economic approach similar to that used by the professor in my seminar. The books apply economic analysis to various social issues, such as sexual behavior, marriage, crime, politics, cheating, lying, farm policies, energy programs, environmental quality, and population.).

67. See generally Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 460-62 (1974). This response to my seminar hypothetical is unfortunately not unlike the comments made by Leff in his critique of an economic analysis of law, when he supposes the outcome of a foreclosure on a widow with six children in the dead of winter. *Id.* at 460-61. In this same article, Leff describes Posner's book, *ECONOMIC ANALYSIS OF LAW*, as "four hundred pages of tunnel vision." *Id.* at 452.

but, as has been argued in this Article, these notable economic philosophers all accept the need to inject moral judgment and guidance into economic analysis in order to preserve a society founded on individual liberty.

Moral judgments are not exclusive to life-and-death situations. A less dramatic example would be an economic proposal for dealing with environmental pollution by implementing a system of licenses to pollute.⁶⁸ Purchasing a license would create a personal property right to pollute a stream or the air.⁶⁹ Theoretically, various polluters could compete for licenses in an auction, internalizing the cost of polluting and thereby creating incentives for industry to reduce pollution in the interest of increasing profits.⁷⁰ Admittedly, the difficult problems here are administrative. Calculating permissible overall levels of pollution, subdividing overall levels into transferable units, conducting the license auction for transferable units, and enforcing compliance would all be difficult to manage. Most economists would probably admit to the difficulty of implementing this regulatory system.

However, the key consideration behind implementing the system should not be administrative difficulty so much as it should be the moral acceptability of allowing pollution in the first instance. The fact that polluters pay for the license does not obviate the danger to human life posed by pollution.⁷¹ Failing to reflect carefully upon the moral issues involved in such a system can lead one logically to suggest a licensing system for muggings, rapes, or nuclear accidents.⁷² Surely the cost of preventing muggings, for instance, could be calculated as easily as that of licensing the right to pollute. Costs of police efforts to prevent muggings and to apprehend and prosecute muggers could be estimated, as could the costs of mental anxiety, lost work time, and medical expenses of injured victims. These costs could be aggregated to determine the socially acceptable level of muggings, and licenses could be issued at a price that covered the cost of the incident itself. Such a system, of course, would be preposterous, but it is not an illogical consequence of a neutral and objective model unchecked by standards of moral values.

Unfortunately, unlikely results are not confined to hypothetical situations. A lack of moral judgment was evident in the "real world" dilemma of the Ford Motor Company and the exploding Pinto automobile.⁷³ The Ford Motor Company manufactured and marketed a compact car known as the Pinto.⁷⁴ Consumer use revealed that a design flaw had made the car a virtual time bomb. A poorly designed fuel tank assembly rendered the Pinto susceptible to an unusually high risk of exploding in a

68. See L. PHILLIPS & H. VOTEY, *ECONOMIC ANALYSIS OF PRESSING SOCIAL PROBLEMS* 151-82 (1974) (discusses environmental quality and the available options for improving present conditions using economics).

69. *Id.* at 172-80.

70. *Id.*

71. See Dolan, *Environmental Policy and Property Rights* in *PROPERTY IN A HUMANE ENVIRONMENT* 209-24 (S. Blumenfeld ed. 1974).

Consider the position of an individual who is left choking on the fumes of a factory which finds it more profitable to pay and pollute than to abate. What consolation is it to him to know that the charge paid is equal to the marginal disutility of choking, as determined by some remote government functionary?

Id. at 223.

72. See *id.* at 223-24. The author suggests that it makes as much sense to license rape as to license pollution.

73. See L. STROBEL, *RECKLESS HOMICIDE?* (1980) (an account of the story behind the Ford Pinto).

74. *Id.* at 17-24. The exploding Pinto problem involved Pinto automobiles manufactured in the early 1970s.

rear-end collision.⁷⁵ Explosions resulting from the design flaw caused numerous injuries and deaths.⁷⁶ The Ford Motor Company, as evidenced by its own internal company memoranda, was aware of the design and explosion problems of the Pinto.⁷⁷ By its own account, Ford undertook to establish the expected payout rate of death and injury claims and to evaluate this cost against the cost of correcting the problem in the Pinto.⁷⁸ With little or no concern for the moral issues involved, Ford determined that the cost of paying the expected claims would be cheaper than correcting the problem, and this cost analysis produced the decision not to correct the defect. As an example of an amoral approach to cost and benefit analysis, the Ford Pinto case emphasizes that economics, when applied as a purely neutral and objective science, is ill-suited to aid the resolution of pressing social problems.

In each of these situations, that of the elderly man, Jones, of environmental pollution, and of the Pinto, the need for moral judgment in decisionmaking is evident. Excluding moral issues from the cost equation fails to preserve inalienable individual human rights. Equally important, one would suspect, from the viewpoint of proponents of an economic analysis of law and social policy, is the negative impact these conclusions have on any attempt to gain acceptance for using economic methods to resolve difficult social problems. Amoral approaches to the value of human life affront societal norms of deference and respect for the life of all people. As a consequence, the use of economic analysis, or the mention of free market economics, in the discussion of law and social policy is often met with resistance, not on the merits of the particular discussion, but as a result of the image of "neutral and objective" economists and political thinkers as willing to push cost and benefit analysis to its logical extreme by calculating away the value of a human life as if it were the equivalent of a dishwasher in an appliance store inventory.

Thus, while economic analysis can be a useful tool in evaluating law and social policy, it also clearly has its limitations. With respect to certain human rights, some problems cannot be reduced to calculable form. Economic analysis must be viewed as only one of many helpful tools for the analysis of pressing social problems. Ultimately, to be useful, economic analysis must be tempered with considerations of right, wrong, and the dignity of human life itself. There is, unfortunately, no magic formula for determining or evaluating these moral considerations easily. It is important to understand the difficulty and complexity of social problems and to avoid

75. *See id.* at 79-92.

76. *Id.*

77. *Id.* at 79-92, 286. *See also* *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 777, 174 Cal. Rptr. 348, 361 (1981).

Harley Copp, a former Ford engineer and executive in charge of the crash testing program, testified that the highest level of Ford's management made the decision to go forward with the production of the Pinto, knowing that the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that "fixes" were feasible at nominal cost. He testified that management's decision was based on the cost savings which would inure from omitting or delaying the "fixes."

119 Cal. App. at 777, 174 Cal. Rptr. at 361.

78. *See* L. STROBEL, *RECKLESS HOMICIDE?* 79-92, 286 (1980). A Ford cost and benefit analysis of the Pinto problem showed that expected savings from corrective action to reduce explosion risk would be about \$49.5 million gained at a cost of \$137 million. The Company concluded that it was not cost-efficient to add an \$11 part per car in order to prevent 180 burn deaths and 180 serious burn injuries per year. *Id.* at 286.

easy solutions based on a simple theory of cost and benefit economics. McKenzie and Tullock may conclude that "[t]he approach of the economist is *amoral*,"⁷⁹ but, as this Article has demonstrated, the socially useful economist must be moral.

V. CONCLUSIONS

Economic analysis provides a useful tool for evaluating law and social policy. Many of today's pressing social problems can be more readily understood through the use of economic methods, and the better one understands a problem, the closer one is to a solution. But despite its promise for a more enlightened understanding of social problems, economic analysis has inherent limitations. Most notable are the shortcomings of contemporary free market economics with respect to human rights issues. Some free market economists and classical liberals, such as Adam Smith, address these shortcomings and advise the use of high standards of moral judgment in making decisions of social significance. Other free market economists are willing to equate human rights to property rights. These theorists reject the right of all people to enjoy life, liberty, and the pursuit of happiness. Furthermore, they do a disservice to economists who promote economic analysis as a useful method of addressing law and social policy issues. In sum, theorists who use cost and benefit analysis to address the fundamental human right to life itself affront strongly held moral values and suggest policy directives so contrary to the normative values of the society that both the economic system and the legal system capable of reaching such conclusions are discredited.

79. R. McKenzie & G. Tullock, *THE NEW WORLD OF ECONOMICS* 6 (1975).

